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IN THE

Supreme Court of the United States

October Term, 1966

No. 769

RAPHAEL J. CHERVY and DOROTHY E. CHERVY,

Petitioners,

vs.

PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY, LIMITED,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Raphael J. Chervy and Dorothy E. Chervy pray that a Writ of Certiorari be issued to review the judgment entered in this case on August 15, 1966, by the United States Court of Appeals for the Ninth Circuit, which affirmed the judgment of the United States District Court, Southern District of California, Central Division (now the United States District Court, Central District of California) entered February 10, 1965.

Opinions Below.

The opinion of the District Court [R. 249], printed in Appendix B, *infra*, pages 2-4, is reported at 243 Fed. Supp. 654. The Supplemental Memorandum Opinion of the District Court [R. 255], printed in Appendix B, *infra*, pages 5-6, has not been reported. The opinion of the Court of Appeals [R. 303], printed in Appendix B, *infra*, pages 6-7, is reported at 364 F. 2d 908.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 15, 1966 [R. 302-303]. The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

Questions Presented.

Whether a ship owes a duty of care to one who is lawfully aboard.

Whether 46 U.S.C. Section 183 (c) is restricted to the relationship between a vessel and its passengers only.

Statute Involved.

The statutory provision involved is 46 U.S.C., Section 183 (c), printed in Appendix A, *infra*, page 1.

Statement of the Case.

This Petition arises out of an action commenced in Admiralty by Raphael J. Chervy (hereinafter referred to as "Chervy") and Dorothy E. Chervy, his wife, for injuries sustained when Chervy fell through a gap between the gun port door of the ship S.S. ARCADIA and the end of the gangway railing. The ship, owned by respondent Peninsular and Oriental Steam Navigation Co., Ltd. (hereinafter referred to as "P. and O."), was at said time docked at Long Beach Harbor on navigable waters of the United States. Jurisdiction was vested in the District Court under Article III, Section 2 of the United States Constitution and 28 U.S.C. Section 1333.

The facts are not in dispute.

On October 16, 1961 [Tr. 113] Chervy and Dorothy E. Chervy (herein referred to as "Mrs. Chervy") were passengers arriving at the port of Long Beach, aboard the S.S. ARCADIA [Tr. 112]. Chervy and Mrs. Chervy disembarked from the ship at approximately 9:00 A.M. [Tr. 113-114] with their baggage and cleared customs [Tr. 87, 115]. By previous arrangement, they and one of Chervy's fellow workers, Norman Eggert (herein referred to as "Eggert"), then transported the Captain of the S.S. ARCADIA, several other officers and Mr. and Mrs. Brown, passengers on the S.S. ARCADIA, to Knott's Berry Farm where they entertained them that afternoon [Tr. 82-88, 114-116]. By invitation of the ship's Captain, Chervy, Mrs. Chervy, their children [Tr. 117-118] and Eggert and friends of Chervy, Mr. and Mrs. Hayward A. Barnett and Mr. and Mrs. Frank K. Dunnann, returned to, and boarded, the ship [Tr. 22-23, 39, 88, 115] that evening where they, as guests of the Captain [Tr. 20, 22, 118, 310], were entertained in his and various other ship's officers' cabins [Tr. 23-25, 40-42, 67, 75, 89-92, 118-120, 220, 306-309]. Before boarding the ship, Chervy executed a pass containing provisions exculpating the ship from any liability for injuries inflicted upon Chervy through the negligent conduct of the ship's agents and employees [R. 464, Tr. 117].

While in the cabins of the various ship's officers, Chervy was served complimentary food and drink by said ship's officers [Tr. 24-25, 42, 119, 308].

The ship's loudspeaker, at ten minute intervals, carried three requests that visitors proceed to shore as the ship was about to sail, the final broadcast being at approximately 11:40 P.M. [Tr. 53, 427, 483-484].

Chervy and Mrs. Chervy were preparing to depart the ship when they were requested by a ship's officer to, and did, visit the cabin of John Culmer, the Deputy Purser of the ship [Tr. 307, 433]. Chervy, Mrs. Chervy, the children and Eggert then proceeded to the location of the gangway [Tr. 92, 121, 219, 222-223], where they bid farewell to the ship's officers, Dr. Keenan, Deputy Purser Culmer, Mr. Hargraves and Staff Captain Vickers [Tr. 91, 120, 221, 302, 316] and Mr. Brown [Tr. 120, 302].

Mrs. Chervy preceded Chervy through the ship's exit and down the gangway while Chervy and Eggert remained on board bidding farewell to Mr. Brown and the ship's officers [Tr. 302]. Eggert having preceded Chervy by approximately a foot or two [Tr. 92], Chervy exited onto the gangway, fell through one of the unprotected gaps, struck the pier and came to rest in the water [Tr. 93], fracturing his skull, his left shoulder, his ribs and his right ankle [Ex. F, Tr. 459], (resulting in a concussion and contusion of the head [Tr. 271, 394], and suffering brain damage [Tr. 146-147, 154, 160, 162, 366, 368-373, 376] and deterioration of his I.Q. [Tr. 149, 361-362].).

The gangway is attached to the ship by means of a metal footplate [Tr. 74-77]. The arms of the gangway do not reach the ship but fall somewhat short, so that when attached there is a gap on each side of the gangway between its arms and the ship of approximately three feet [Tr. 74, 78, 93].

Ropes are lashed to the gangway arms and the ship so as to enclose said gaps [Tr. 79-80].

The British Factory Act requires that the ship string safety netting under the gangway [Tr. 72].

Pursuant to the practice of P. and O., its local passenger agent, David James Lambert Hodgson (herein referred to as "Hodgson"), upon his final departure from the ship prior to its sailing (having just passed Chervy who was a few feet from the ship's exit [Tr. 219] and knowing Chervy was to depart the ship down the gangway [Tr. 219]) informed the ship's gangway officer stationed at the exist of the ship where the gangway was attached that the agents and officials were ashore [Tr. 63, 215-216]. Hodgson did not advise Chervy that Chervy should be ashore and to proceed ashore [Tr. 233]. The gangway officer then telephoned this information to the ship's Chief Officer, John McDonald Chester (herein referred to as "Chester"), stationed on the Bridge who then ordered the gangway officer to prepare for landing the gangway. As a result, the lashings were removed from the gap [Tr. 61-62] and the safety net removed [Tr. 72]. In the ordinary practice of the ship and of P. and O., if a visitor were still aboard the vessel and this was known to the ship's officers the order which caused the removal of the lashings would not be given [Tr. 62-64]. Chester, a responsible ship's officer and former gangway officer, recognized there was a hazard and utilized extra caution when the lashings were down and there was a gap in the gangway [Tr. 82]. In the normal practice of P. and O., the agents and officials are the last ones to leave the ship [Tr. 61].

At this time there were various members of the ship's crew stationed at the gun-port exit [Tr. 49, 63, 94, 219-221, 302, 311-312, 316-317, 488]. It is a practice of P. and O. to have these crewmen tell the persons utilizing the gangway to watch their step if there

is any danger [Tr. 63]. Yet, Eggert, who started through the gunport exit at the same time Chervy did [Tr. 92], was not given any warning about the gap [Tr. 94]. Chervy is unable to recall if he was so warned [Tr. 121]. No ship's personnel testified that any warning was given about the gap or assistance rendered to Chervy of Eggert.

The District Court found (1) P. and O. was negligent because its last warning broadcast failed to specifically warn that the preparations to land the gangway would commence prior to midnight, which preparation would make it dangerous for visitors to delay their disembarkation, and (2) that P. and O. was not otherwise negligent [R. 279]. The District Court concluded as a matter of law that the provisions of 46 U.S.C. Section 183 (c) applied only as between common carriers and passengers and that Chervy was a guest at the time of injury and thus P. and O. was entitled to rely upon the exculpatory provisions of the boarding pass [R. 464], and gave judgment for P. and O.

The Court of Appeals determined that finding (1) above of the District Court was clearly erroneous and that finding (2) above was not clearly erroneous and determined that P. and O. was not negligent. The District Court then determined that it was unnecessary to interpret the provisions of 46 U.S.C. Section 183 (c) and affirmed the judgment [R. 303].

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Failed to Comply With the Standard Set Forth by This Court in Kermarec v. Transatlantique, 358 U.S. 625.

The *Kermarec* case, printed in Appendix C, *infra,* pages 8-9, abolished the old common law distinction between invitee and licensee in Admiralty, and held that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interest the duty of exercising reasonable care under the circumstances of each case.

The District Court devoted over one-half of its Memorandum Opinion to a discussion of the common law differences between invitee and licensee and inferred that Chervy was a licensee and thus was owed a lower standard of care. In its findings of fact the District Court held that P. and O. was under a duty to include in its last warning broadcast a warning that preparations to land the gangway would commence prior to the midnight sailing time and thus persons then on board who were not sailing with the ship would be warned that the gangway would not be in the same condition as when they boarded. The District Court found that P. and O. was not otherwise negligent, thus finding that P. and O. had no other duty under these circumstances to Chervy. The Court of Appeals, in holding that the District Court's finding as to P. and O.'s duty was clearly erroneous, has held that, as a matter of law, P. and O. was under no duty to warn Chervy of the gap in the gangway and, ac-

tually, owed no duty to Chervy at all. Thus, the status of the matter now is that Chervy, or any other person on board a passenger vessel who is not going to sail with said vessel, boards said vessel at his peril.

The question of whether a ship owes a duty of care to one other than a passenger who was lawfully on board presents a serious question and has ramifications far exceeding the narrow confines of this particular case. In the calendar year 1964, 1,353,428[1] persons travelled as passengers on Liners entering and exiting United States Ports. Hodgson has testified that on the day in which this accident has occurred about 185 passengers embarked and there could have been 500 visitors who boarded the ARCADIA [Tr. 474]. Based on a ratio of 500 visitors for every, say, 200 passengers, it is clear that in the calendar year 1964, approximately 3,383,500 persons who were not going to sail with the Liners boarded said vessels and were thereby exposed to potential injury. The decision of the Court of Appeals which clearly indicates a vessel does not have a duty of care towards non-passengers who are lawfully on board will have far-reaching effect and may touch upon a significant portion of this Country's population.

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[1]Total Passenger Traffic in U.S. Oceanborne Foreign Trade Calendar Years 1964 and 1963.
United States Department of Commerce
Maritime Administration
Office of Statistics
Division of Cargo Data
Reports Branch
Dated September 1, 1965.

2. The Decision Below Is in Conflict With the Principle of the Decision of the Court of Appeals for the Second Circuit in McCann v. Anchor Line (2 Cir. 1935), 79 F.2d 338.

The *McCann* case, printed in Appendix C, *infra*, pages 15-17, also obviated the distinction between an invited person and a "business visitor" on board a ship and held that leave to visitors to go aboard a vessel is in the interest of a shipowner.

The District Court held:

> "The court therefore concludes that entertaining visitors on board ship is not a part of the obligation of the steamship company as a common carrier. This is a gratuitous service which a visitor may accept upon the terms and conditions under which it is offered, or he may decline. Exculpatory provisions such as those in the boarding pass are not, under the circumstances here existing, repugnant to public policy and may, therefore, be enforced."

This is in clear conflict with the principle enumerated in the *McCann* case.

> ". . . We do not find it necessary to decide that question because the visiting friend of a passenger leaving on a transatlantic steamer appears to us to be in another class. The tradition still to some extent endures that such a trip is an occasion of some consequence; passengers like to have their friends see them off, and have come so far to ex-

> pect it as part of the prerequisites of the trip that they would resent its denial in a way that would be serious to the line that undertook to deny it. It seems to us that for this reason leave to visitors to go aboard is in the interest of the shipowner; it is a customary appurtenance of his passengers' privileges which he cannot safely refuse, which indeed it is not extravagant to consider as one of the inducements that he holds out to them, and for which he is paid."

Taking *in toto* the decisions of the District Court and of the Court of Appeals, we are left with a clear conflict with this principle.

3. The Decision Below Is Erroneous.

The District Court, upon all of the undisputed facts as hereinbefore set forth, found that P. and O. was under a duty to include a warning in its last broadcast prior to sailing [R. 279]. While the Petitioners assert that P. and O. also had a further duty under the circumstances of this case, the Court of Appeals has held that even this minimal duty was not owed Chervy by P. and O. Thus, Chervy is in a position of having no duty of care owed him.

The District Court further concluded that 46 U.S.C. Section 183 (c) was intended to govern only the relationship between common carrier and passengers. The Court of Appeals, in holding that P. and O. was under no duty to Chervy, and thus was not negligent, held that it was unnecessary to consider the validity of the exculpatory provisions executed by Chervy in light of this section [R. 303]. The clear language of 46 U.S.C. Section 183 (c) shows that it is applicable not only to the relationship between a common carrier and passen-

gers but would govern the relationship between the common carrier and others who are lawfully on board the carrier. This Court, in the *Kermarec* case, specifically reserved ruling on whether 46 U.S.C. Section 183 (c) is applicable when the person injured on board a vessel is a visitor and not a passenger. (See footnote 1 to the *Kermarec* case, printed in Appendix C, pages 8-9).

4. Continuing Questions of Importance in the Area of Admiralty Law Are Present Unless This Court Definitively Interprets 46 U.S.C. Section 183 (c).

The Court of Appeals, in holding that the District Court was clearly erroneous in finding a duty on the part of P. and O., held that P. and O. was not negligent and therefore it was unnecessary to construe the provisions of 46 U.S.C. Section 183 (c) [R. 303]. It is submitted that there is a strong public policy reason behind the enactment of this Section, namely to provide protection for those who are lawfully aboard a passenger carrying vessel and to require the owner of said vessel to take precautions against injuring said persons. As is pointed out, *supra,* page 7, in 1964 over one million passengers travelled on liners engaged in foreign trade. This Code Section is an effective way to insure that foreign-owned passenger carrying vessels exercise due care for the safety of those aboard. It is unnecessary to search as far back as the disaster involving the passenger vessel S.S. MORRO CASTLE, nor even as relatively far back as the YARMOUTH CASTLE disaster, to find an example involving a passenger carrying vessel wherein this public policy is shown to be sound. In September of this year, a fire swept the German liner HANSEATIC berthed in New York and raged out of control for six and a half

hours. The fire was discovered less than four hours before the scheduled sailing time and the ship was to have sailed with over 300 passengers aboard (having just discharged 700 passengers a day and a half earlier).[1] It is interesting to note that the same newspaper article makes reference to the burning of the French liner NORMANDIE in 1942 at the same pier. This Court specifically excepted ruling on whether 46 U.S.C. Section 183 (c) was applicable to void an exculpatory clause in a boarding pass in the *Kermarec* case, *infra*, Appendix C (see footnote 1, p. 9), because the evidence in that case showed that Kermarec had not seen the pass nor been informed of the language appearing on it. It is submitted that it is important to the administration of Admiralty Law and to the protection of the citizens of this Country that this Court provide a definitive interpretation of this Code Section. Petitioners have been unable to locate any reported decisions, other than the *Kermarec* case, wherein a visitor to a passenger carrying vessel executed an exculpatory clause relieving the ship from responsibility for its negligence. It can be seen that, unless this Court jnterprets the language of this Code Section, there will be a continuing uncertainty in this important area.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERALD G. KELLY,
MICHAEL W. CONLIN,
Attorneys for Petitioners.

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[1] "Los Angeles Times" September 8, 1966.

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APPENDIX A.

Statute Involved.

46 U.S.C., Section 183c

"It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect."

APPENDIX B.

[R. 249] Raphael J. CHERVY and Dorothy E. Chervy, Libelants v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY, Ltd., and City of Long Beach, California, Respondents.

PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY, Ltd., Cross-Libelants, v. Raphael J. CHERVY and Dorothy E. Chervy, Cross-Respondents.

No. 62-1146.

United States District Court S. D. California, Central Division.

Nov. 20, 1964.

Action against vessel owners. The District Court, Curtis, J., held that ex-passengers who, after leaving ship, again went on board in evening, boarded not as passengers but as guests, and were subject to exculpatory provisions of boarding pass relieving shipowner from liability for ordinary acts of negligence.

Judgment for respondents.

Musick, Peeler & Garrett, Los Angeles, Cal., for libelants.

Graham, James & Rolph, San Francisco, Cal., for respondents.

CURTIS, District Judge.

The court finds that libelants' status as passengers terminated the morning upon which the SS ARCADIA arrived at Long Beach. After libelants had left the ship and removed their luggage their rights to re-board the ship as passengers no longer existed. When they went aboard in the evening, they boarded not as pas-

sengers, but as guests. This being so, the respondents are entitled to rely upon the exculpatory provisions of the boarding pass as relieving them from ordinary acts of negligence.

Although the provisions of Title 46 U.S.C. § 183c prohibit the owners of vessels from inserting in any agreement to transport passengers, provisions purporting to relieve such owners from liability, such provisions were intended to apply as between common carrier and passengers. Moore v. American Scantic Line, 30 F.Supp. 843 (S.D.N.Y. 1939), affirmed 121 F.2d 767 (2nd Cir. 1941). Arnstad v. United States, 68 F.Supp. 823 (W.D.Wash. 1946). Language similar to that contained in § 183c has been held to apply only to passengers. Barrette v. Home Lines, Inc., 168 F.Supp. 141 (S.D. N.Y.1958); Mulvihill v. Furness, Withy & Co., 136 F.Supp. 201, (S.D.N.Y.1955).

The case of Lawlor v. Incres Nassau Steamship Line, Inc., 161 F.Supp. 764 (Mass.1958) cited by the libelants is not in point. The court said:

> "A carrier that contracts to take a passenger on a cruise stopping at a designated foreign port has a duty if the vessel anchors in that harbor to provide him with safe transportation, under adequate supervision, to and from the dock. The Valencia, D.C.D.Wash., 110 F.221."

This is to say that the relationship of passengers and carrier, under that rule, exists from shore to ship and ship to shore. The opinion thereafter deals with the nature and extent of the duty of carrier to its passengers under circumstances quite dissimilar from the facts here in question.

In the present case the relationship of carrier to passenger had ceased and the libelant was a guest at the time of the injury.

The common law rule that because of public policy a common carrier cannot secure immunity from liability for its own negligence has no application when the carrier is acting outside of performance of its duty as a common carrier. Santa Fe, P. & P. Ry. Co. v. Grant Bros. Const. Co., 288 U.S. 177, 33 S.Ct. 474; 57 L.Ed. 787 (1912); Baltimore & Ohio S. W. Ry. Co. v. Voigt, 176 U.S. 498, 20 S.Ct. 385, 44 L.Ed. 560 (1899); Schiemann v. Grace Line, Inc., 269 F.2d 596 (2nd Cir. 1959).

The court therefore concludes that entertaining visitors on board ship is not a part of the obligation of the steamship company as a common carrier. This is a gratuitous service which a visitor may accept upon the terms and conditions under which it is offered, or he may decline. Exculpatory provisions such as those in the boarding pass are not, under the circumstances here existing, repugnant to public policy and may, therefore, be enforced.

Judgment shall therefore be for the respondents upon the libel, and since no evidence was produced at the time of trial upon the cross-libel, the same is hereby dismissed.

Respondents' attorneys shall prepare findings of fact, conclusions of law and judgment.

Supplemental Memorandum Opinion.

No. 62-1146-JWC

[R. 255] UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

RAPHAEL J. CHERVY and DOROTHY E. CHERVY, Libelants, vs. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY, LTD., and CITY OF LONG BEACH, CALIFORNIA, Respondents.

PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY, LTD., Cross-Libelants. vs. RAPHAEL J. CHERVY and DOROTHY E. CHERVY, Cross-Respondents.

Although the court has heretofore found that the exculpatory provisions of the boarding pass are valid and relieve the respondent Peninsular and Oriental Steam Navigation Company, Ltd. from all liability herein, the court finds that the libelant has suffered damages in the following amounts:

Lost income	$12,088.23
Other special damages	8,674.92
General damages	50,000.00
Total damages	$70,763.15

The court further finds that both libelants and respondent Peninsular and Oriental Steam Navigation Company, Ltd. were negligent and that the negligence of each contributed to the accident in which the libelant

Raphael J. Chervy was injured, but that the libelant's negligence contributed to the extent of 60 percent thereof and the said respondent's negligence contributed to the extent of 40 percent thereof.

Therefore, but for the exculpatory provisions of the boarding pass, the libelant would be entitled to recover the sum of $28,295.26.

Dated this 2nd day of December, 1962. (sic)

/s/ JESSE W. CURTISS
United States District Judge

[R. 303] UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Raphael J. Chervy and Dorothy E. Chervy, Appellants, vs. Peninsular and Oriental Steam Navigation Company, Ltd., and City of Long Beach, California, Appellees.

Peninsular and Oriental Steam Navigation Company, Ltd., Appellants, vs. Raphael J. Chervy and Dorothy E. Chervy, Appellees.

No. 20,029

[August 15, 1966]

Appeals from the United States District Court for the Southern District of California, Central Division. Before: Chambers, Barnes and Duniway, Circuit Judges. Per Curiam:

We are of the opinion that the court's finding, reading as follows:

> "That respondent, PENINSULAR, was negligent in that the last warning broadcast failed to specifically warn that the preparations to land the gangway would commence prior to midnight, which preparations would make it dangerous for visitors to delay their disembarkation, by reason whereof visitors could have concluded that the gangway would be in the same condition immediately prior to midnight as it had been earlier."

is clearly erroneous. As is stated elsewhere in the findings, the steamship company, at 11 o'clock, began broadcasting warnings over the public address system that the vessel would depart at midnight, and advising visitors to disembark. Such warnings do not purport to describe the conditions under which the visitors will disembark and we think that there is no duty on the steamship company to give such advice as a part of such a warning.

The court found that the steamship company was not otherwise negligent and we are of the opinion that the finding was not clearly erroneous. It follows that the judgment in favor of the steamship company must be affirmed, since it was not negligent. It is unnecessary that we consider the validity of the waiver signed by Chervy on which the trial court relied in giving judgment for the steamship company, or the other questions presented in the briefs.

Affirmed.

APPENDIX C.

Joseph Kermarec, Petitioner v. Compagnie Generale Transatlantique.

358 US 625, 3 L ed 2d 550, 79 S Ct 406.

[No. 22]

Argued November 13, 1958. Decided February 24, 1959.

Summary.

Petitioner, injured while on board defendant's vessel on navigable waters in New York State for the purpose of visiting a member of the crew, sought recovery in an action in the United States District Court for the Southern District of New York, alleging unseaworthiness of the vessel and negligence on the part of its crew. The District Court held that New York substantive law was applicable, and accordingly eliminated the unseaworthiness claim and instructed the jury that petitioner was a licensee who could recover only if the shipowner had failed to warn him of a dangerous condition within his actual knowledge and only if he himself were entirely free from contributory negligence. A jury's verdict in plaintiff's favor was set aside, and the complaint was dismissed, on the ground that there was no proof that the shipowner had actually known of the dangerous conditions causing petitioner's injury. The United States Court of Appeals for the Second Circuit affirmed, but its opinion failed to indicate whether the affirmance was based upon agreement that New York law was applicable, or upon the determination that the controlling legal principles would be no different under maritime law. (245 F2d 175.)

On certiorari, the United States Supreme Court unanimously vacated the judgment below. STEWART, J., held that the governing law was maritime, and not New York law, and that distinctions between the duty owed licensees and invitees are inappropriate to maritime law. The cause was remanded with instructions to reinstate the jury verdict and enter judgment thereon.

EDWARD J. MALAMENT, of New York City, argued the cause for petitioner.

GEORGE A. GARVEY, of New York City, argued the cause for respondent.

Opinion of the Court.

Mr. Justice Stewart delivered the opinion of the Court.

On November 24, 1948, the respondent's vessel, the S. S. Oregon, was berthed at a pier in the North River, New York City. About noon on that day Joseph Kermarec came aboard to visit Henry Yves, a member of the ship's crew. The purpose of the visit was entirely personal, to pay a social call upon Yves and to give him a package to be delivered to a mutual friend in France. In accordance with customary practice permitting crew members to entertain guests aboard the vessel, Yves had obtained a pass from the executive officer authorizing Kermarec to come aboard.[1] As he started to leave the

[1]The pass contained the following language: The person accepting this pass in consideration thereof assumes all risks of accidents, and expressly agrees that the Compagnie Generale Transatlantique shall not be held liable under any circumstances whether by negligence of their employees, or otherwise, for any injury to his person or for any loss or injury to his property." The district judge instructed the jury that this attempted dis-

(This footnote is continued on the next page)

ship several hours later, Kermarec fell and was injured while descending a stairway.

On the theory that his fall had been caused by the defective manner in which a canvas runner had been tacked to the stairway, Kermarec brought an action for personal injuries in the District Court for the Southern District of New York, alleging unseaworthiness of the vessel and negligence on the part of its crew. Federal jurisdiction was invoked by reason of the diverse citizenship of the parties, and a jury trial was demanded.

The district judge was of the view that the substantive law of New York was applicable. Accordingly, he eliminated the unseaworthiness claim from the case and instructed the jury that Kermarec was "a gratuitous licensee" who could recover only if the defendant had failed to warn him of a dangerous condition within its actual knowledge, and only if Kermarec himself had been entirely free of contributory negligence.

The jury returned a verdict in Kermarec's favor. Subsequently the trial court granted a motion to set the verdict aside and dismiss the complaint, ruling that there had been a complete failure of proof that the shipowner had actually known that the stairway was in a dangerous or defective condition. A divided Court of Appeals affirmed. The opinion of that court does not make clear whether affirmance was based upon agreement with the trial judge that New York law

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claimer could have no effect unless it had been made known to Kermarec. The evidence showed that Kermarec had not seen the pass. By its verdict the jury implicitly found that Kermarec had not been informed of the language appearing on it. Since that finding is not disputed here, we need not consider what effect the attempted disclaimer would have had if Kermarec had been aware of it. See More v. American Scantic Line, Inc. (CA 2 NY) 121 F2d 767. Compare 46 USC §183c.

was applicable, or upon a determination that the controlling legal principles would in any event be no different under maritime law. 245 F2d 175. Certiorari was granted to examine both of these issues. 355 US 902, 2 L ed 2d 259, 78 S Ct 335.

The District Court was in error in ruling that the governing law in this case was that of the State of New York. Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. See The Plymouth (Hough v. Western Transp. Co.) (US) 3 Wall 20, 18 L ed 125; Philadelphia, W. & B. R. Co. v. Philadelphia & H. de Grace Steam Towboat Co. (US) 23 How 209, 215, 16 L ed 433, 435; The Commerce (Commercial Transp. Co. v. Fitzgarald) (US) 1 Black 574, 579, 17 L ed 107, 109; Re Rock Island Bridge (Galena, D. D. & M. Packet Co. v. Rock Island R. Bridge Co.) (US) 6 Wall 213, 215, 19 L ed 753, 754; The Belfast (US) 7 Wall 624, 640, 19 L ed 266, 270; Leathers v. Blessing, 105 US 626, 630, 26 L ed 1192, 1194; The Admiral Peoples, 295 US 649, 651, 79 L ed 1633, 1634, 55 S Ct 885. If this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties. Carlisle Packing Co. v. Sandanger, 259 US 255, 259, 66 L ed 927, 930, 42 S Ct 475. Where the plaintiff exercises the right conferred by diversity of citizenship to choose a federal forum, the result is no different, even though he exercises the further right to a jury trial. Whatever doubt may once have existed on that score was effec-

tively laid to rest by Pope & Talbot, Inc. v. Hawn, 346 US 406, 410, 411, 98 L ed 143, 151, 152, 74 S Ct 202. It thus becomes necessary to consider whether prejudice resulted from the court's application of the substantive law of New York.

In instructing the jury that contributory negligence on Kermarec's part would operate as a complete bar to recovery, the district judge was clearly in error. The jury should have been told instead that Kermarec's contributory negligence was to be considered only in mitigation of damages. The Max Morris, 137 US 1, 34 L ed 586, 11 S Ct 29; Pope & Talbot, Inc. v. Hawn, 346 US 406, 408, 409, 98 L ed 143, 150, 151, 74 S Ct 202. It is equally clear, however, that this error did not prejudice Kermarec. By returning a verdict in his favor, the jury necessarily found that Kermarec had not in fact been guilty of contributory negligence "even in the slightest degree."

The district judge refused to submit the issue of unseaworthiness to the jury for the reason that an action for unseaworthiness is unknown to the common laws of New York. Although the basis for its action was inappropriate, the court was correct in eliminating the unseaworthiness claim from this case. Kermarec was not a member of the ship's company, nor of that broadened class of workmen to whom the admiralty law has latterly extended the absolute right to a seaworthy ship. See Mahnich v. Southern S.S. Co, 321 US 96, 88 L ed 561, 64 S Ct 455; Seas Shipping Co. v. Sieracki, 328 US 85, 90 L ed 1099, 66 S Ct 872; Pope & Talbot, Inc. v. Hawn, 346 US 406. Kermarec was aboard not to perform ship's work, but simply to visit a friend.

It is apparent, therefore, that prejudicial error occurred in this case only if the martime law imposed upon the shipowner a standard of care higher than the duty which the district judge found owing to a gratuitous licensee under the law of New York. If, in other words, the shipowner owed Kermarec the duty of exercising ordinary care, then upon this record Kermarec was entitled to judgment, the jury having resolved the factual issues in his favor under instructions less favorable to him than should have been given. Stated broadly, the decisive issue is thus whether admiralty recognizes the same distinctions between an invitee and a licensee as does the common law.

It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew. Leathers v. Blessing, 105 US 626, 27 L ed 1192; The Max Morris, 137 US 1, 34 L ed 586, 11 S Ct 29; The Admiral Peoples, 295 US 649, 79 L ed 1633, 55 S Ct 885. But this Court has never determined whether a different and lower standard of care is demanded if the ship's visitor is a person to whom the label "licensee" can be attached. The issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts. The Lottawanna (Rodd v. Heartt) (US) 21 Wall 558, 22 L ed 654; The Max Morris (US) supra.

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society,

with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."

For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality. The Lottowanna (Rodd v. Heartt) (US) 21 Wall 558, at 575, 22 L ed 654, 662. The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea. We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case. It follows that in the present case the judgment must be vacated and the case remanded to the District Court with instructions to reinstate the jury verdict and enter judgment accordingly.

It is so ordered.

McCann v. Anchor Line (Henderson Brothers), Limited, et al.

No. 476

Circuit Court of Appeals, Second Circuit

July 1, 1935

Appeal from the District Court of the United States for the Southern District of New York.

Personal injury action by Mary McCann against the Anchor Line (Henderson Brothers), Limited, and another. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Lord, Day & Lord, of New York City (Thaddeus G. Cowell and Woodson D. Scott, both of New York City, of counsel), for appellant.

Lucien V. Axtell and Francis Cunningham, both of New York City (Joseph A. Fagnant and Silas B. Axtell, both of New York City, of counsel), for appellee.

Before L. HAND, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

PER CURIAM

The only point requiring discussion in this case is whether the plaintiff was an "invited person" or a "business visitor" while on board the defendant's ship, the Caledonia, in the port of New York. She had gone on board to say good-bye to a friend who was a passenger, and while there caught her foot upon the top of a companionway, which we must assume to have been negligently left out of repair. If she was merely a licensee, the defendant was not liable; otherwise, if she was a business visitor. The passenger's daughter had

invited her to see her mother off when the ship left, and on that invitation she boarded the vessel and was walking with a party of three or four, one of whom was the passenger's son-in-law, towards the passenger's stateroom. The jury might infer that the passenger had already seen her, had welcomed her, and wished her to go to the stateroom; in other words, that the passenger had invited her to join the party after she came on board.

The books are not altogether clear as to the duty of a railway company towards those who come on its premises to say good-bye to, or to meet, its passengers. When the purpose is to help or guard the passenger, the attendant is certainly a business visitor, but, when it is merely to greet or speed him, the decisions are not uniform. In Galveston, etc., Ry. Co. v. Matzdorf, 102 Tex. 42, 112 S. W. 1036, 20 L.R.A. (N.S.) 833, 132 Am. St. Rep. 849, Arkansas, etc., Ry. Co. v. Sain, 90 Ark. 278, 119 S.W. 659, 22 L.R.A. (N.S.) 910, and Montgomery, etc., Ry. Co. v. Thompson, 77 Ala. 448, 457, 54 Am. Rep. 72 (semble), the visitor was treated as a licensee only. Not so in McKone v. Michigan Cent. R. Co., 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596, Banderob v. Wisconsin Cent. Ry. Co., 133 Wis. 249, 113 N.W. 738, Hutchins v. Penobscot, etc., Steamboat Co., 110 Me. 369, 86 A. 250, Ann. Cas. 1914D, 132, and Powell v. Great Lakes, etc., Corporation, 152 Minn. 90, 188 N. W. 61 (the last case concerned a steamship company). We do not find it necessary to decide that question because the visiting friend of a passenger leaving on a transatlantic steamer appears to us to be in another class. The tradition still to some extent endures that such a trip is an occasion of some conse-

quence; passengers like to have their friends see them off, and have come so far to expect it as part of the prerequisites of the trip that they would resent its denial in a way that would be serious to the line that undertook to deny it. It seems to us that for this reason leave to visitors to go aboard is in the interest of the shipowner; it is a customary appurtenance of his passengers' privileges which he cannot safely refuse, which indeed it is not extravagant to consider as one of the inducements that he holds out to them, and for which he is paid.

Judgment affirmed.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 769

RAPHAEL J. CHERVY and DOROTHY E. CHERVY,

Petitioners,

vs.

PENINSULAR & ORIENTAL STEAM NAVIGATION COMPANY, Limited,

Respondent.

Brief in Opposition to Issuance of Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Supreme Court of the United States:

Comes Now respondent and submits this brief in opposition to the issuance of a writ of certiorari in this cause to the United States Court of Appeals for the Ninth Circuit.

Questions Presented.

Petitioners have framed two questions which they seek to have reviewed by this court. It is respectfully suggested, however, that the only questions raised by the decision of the Court of Appeals in this matter are:

(1) Does a shipowner's duty of reasonable care toward all who are lawfully aboard its vessel,

under the circumstances of the case, require a specific warning (in the last of three broadcasts warning visitors to depart) that preparations to land the gangway would commence prior to the vessel's scheduled time of departure, and that such preparations would make it dangerous for visitors to delay their disembarkation.

(2) Under the facts of the instant action, was respondent Peninsular and Oriental Steam Navigation Company, Limited (hereinafter referred to as P. & O.) negligent, proximately causing injury to Raphael J. Chervy.

It is apparent that both of the questions raised by the decision of the Court of Appeals in this cause are predominantly factual issues. The petition makes a valiant effort to create "issues of law", and to demonstrate a conflict among the decisions of various Courts of Appeal and this Court with respect to an important question of law. As pointed out in the Argument of this brief, petitioners' efforts fail, being predicated upon a misinterpretation of the decision of the Court of Appeals in this action.

Petitioners' efforts to create "issues of law" cannot disguise the fact that their basic objective is to have the facts reviewed by this Court after the Court of Appeals very carefully considered them, reversed one of the District Court's findings as clearly erroneous, affirmed the remaining findings as not clearly erroneous, and affirmed the judgment without reaching the issue of the validity of the exculpatory clause. In doing so, petitioners disregard the repeated holdings of this Court that it does not sit in judgment on questions of fact

and conflicts of evidence, and that certiorari does not lie to determine whether the evidence supports the findings. The rule has been enunciated and applied by this Court in many cases, including the following:

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220 at 227, 69 L. Ed. 925 at 926.
>
> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Co. v. Western Electric Co.,* 304 U.S. 175 at 178, 82 L. Ed. 1273 at 1275.

Statement of the Case.

Although petitioners state that "The facts are not in dispute." (Pet. Cert. p. 2) a number of facts are in dispute and others of importance were omitted from petitioners' Statement of the Case. The following are the pertinent facts:

On October 16, 1961 [Tr. p. 113] at approximately 8:00 p.m. petitioners boarded the SS ARCADIA, then docked at Long Beach, California, as social guests of crew members [Tr. pp 118-120, 310, 431-433]. Prior to boarding Chervy executed a boarding pass containing an exculpatory clause [Tr. p. 117].

At approximately 11:45 p.m. petitioners, with their children and a friend, arrived at the foyer opposite the gun port door from which petitioners were to leave the vessel [Tr. pp. 92, 98, 309].

The vessel's public address system, at ten minute intervals, broadcast warnings that visitors should disembark as the vessel was preparing to sail, the last broadcast, which stated that it was the final one, being made

at approximately 11:40 p.m. [Tr. pp. 52-53]. Mrs. Chervy, and the Chervy children departed the vessel shortly after arrival in the foyer [Tr. pp. 302, 309, 467] but Mr. Chervy remained on board until approximately 11:58 p.m. [Resp. Ex. A].

Approximately five minutes prior to the vessel's scheduled midnight departure David Hodgson, manager of P. & O.'s local agent, departed the vessel after advising the gangway officer that the agents and officials were ashore [Tr. pp. 63, 215-216].

The gangway in question is three feet six inches wide, and had railings which extended to within three feet of the side of the vessel [Resp. Ex. B]. The gaps between the end of the railings and the side of the vessel were closed by rope lashings until approximately 11:58 p.m. [Resp. Ex. A], at which time they were removed so that the gangway could be landed and the vessel could depart at midnight [Resp. Ex. A]. Hodgson's departure from the vessel was prior to the removal of the lashings [Tr. pp. 61-63]. Just after the lashings were removed Chervy exited through the gun port door onto the gangway, turned to his left as though to wave to someone on board the vessel and toppled backward from the gangway [Tr. p. 466].

After trial the District Court denied recovery to petitioners on the ground that they were barred by the exculpatory clause in the boarding pass executed by Chervy prior to boarding the ARCADIA. Thereafter, by Supplemental Memorandum Opinion, the District

Court held that Chervy had been damaged in the sum of $70,773.15; that both Chervy and P. & O. were negligent; that the negligence of Chervy contributed 60 per cent to his injury and damages, and that of P. &. O. 40 per cent. The District Court therefor held that, but for the exculpatory provisions of the boarding pass, Chervy would be entitled to recover the sum of $28,-295.26. The District Court found that P. & O.'s only negligence was that its last broadcast failed to specifically warn that preparations to land the gangway would commence prior to midnight, which preparations would make it dangerous for visitors to delay their disenbarkation. The United States Court of Appeals for the Ninth Circuit, held that the District Court's finding the P. & O. was negligent, as specified above, was clearly erroneous, but that its finding that P. & O. was not otherwise negligent was not clearly erroneous. The Court of Appeals therefore affirmed the judgment, concluding that it was not necessary to consider the validity of the exculpatory clause.

ARGUMENT.

I.

Introduction.

In their petition, petitioners erroneously attempt to construct a conflict between the decision of the Ninth Circuit Court of Appeals in this case, the decision of this Court in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, and the decision of the Court of Appeals for the Second Circuit in *McCann v. Anchor Line,* 79 F. 2d 338 (2 Cir. 1935). They likewise erroneously claim that the Court of Appeals for the Ninth Circuit decided an important issue incorrectly. These arguments are predicted upon two fundamental errors.

Firstly, petitioners persistently treat their Petition for a Writ of Certiorari as though the decision and judgment to be reviewed were that of the District Court, rather than that of the Court of Appeals. Thus, their entire argument relating to the validity of the exculpatory clause in the boarding pass deals solely with the decision of the District Court, and not with the decision of the Court of Appeals which affirmed without reaching that issue, by reason whereof such issue is not before this court. There is no more reason to grant certiorari because of the importance of an issue which might have been decided by a Court of Appeals, but was not, than there is with respect to a state court decision raising an important federal question, but which is sustainable on an independent ground.

Secondly, petitioners erroneously contend (Pet. Cert. pp. 8, 10) that the Court of Appeals held that P. & O. owed no duty to Chervy. The Court of Appeals did

not so hold. The Court of Appeals held that under the circumstances, P. & O. was not obligated to advise in its final broadcast that preparations to land the gangway would commence prior to midnight and that such preparations would make it dangerous for visitors to delay their disembarkation. The reversal by the Court of Appeals of the District Court's holding that P. & O. was negligent in this particular, coupled with affirmance of the District Court's finding that P. & O. was not otherwise negligent, result in the determination that P. & O. did not fail to fulfill the duties which it owed to petitioners. This is far different from the conclusion drawn by petitioners that the Court of Appeals thereby held that P. & O. "... owed no duty to Chervy at all." (Pet. Cert. p. 8), a conclusion which has no basis in law, fact or reason. The crux of petitioners' error is their incorrect assumption that a finding of no negligence is the equivalent of a finding of no duty.

II.

The Decision of the Court of Appeals Does Not Violate the Standards Established in Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625.

Petitioners' contention, that their petition should be granted because the Court of Appeals failed to comply with the standards set by this Court in *Kermarec* falls because it is predicated upon the erroneous assertion that the Court of Appeals held that P. & O. owed no duty to Chervy, whereas in fact the Court of Appeals held that P. & O. was not negligent toward Chervy.

III.

The Decision of the Court of Appeals Does Not Conflict With the Decision of the Court of Appeals for the Second Circuit in McCann v. Anchor Line (2 Cir. 1935), 79 F. 2d 338.

Petitioners contend that the Court of Appeals' decision is in conflict with the principle of the decision of the Court of Appeals for the Second Circuit in *McCann v. Anchor Line.* This contention is erroneous because it is entirely predicated upon language in the District Court's Memorandum Opinion dealing exclusively with the exculpatory clause. This language is not now pertinent because the Court of Appeals did not reach the issue of the validty of the exculpatory clause.[1]

IV.

The Decision of the Court of Appeals Is Not Erroneous.

Petitioners' claim, that the decision of the Court of Appeals is erroneous, is based upon two grounds: (1) that the Court of Appeals erroneously held that P. & O. owed no duty to Chervy; and (2) that therefore the Court of Appeals erroneously determined that it was

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[1]In addition, there is no conflict between the District Court's language in this case and that of the Court of Appeals in *McCann.* The District Court in this action was dealing with the distinction between a visitor and a passenger as it bears on the public policy question of the validity of an exculpatory clause; the Court of Appeals in *McCann* was dealing with a determination of whether or not a visiting friend of a passenger was "an invited person" or "business visitor" in order to ascertain the standard applicable to such person (*McCann,* of course, was a pre-*Kermarec* case). Further, the rationale of the *McCann* case rests upon the economic benefit to a shipowner of visiting friends of the passengers, whereas the instant action involves social guests of crew members.

unnecessary to consider the issue of the validity of the exculpatory clause in the boarding pass. Petitioners err on both counts. As previously indicated in Section I of the Argument of this brief, the Court of Appeals did not hold that Chervy was owed no duty by P. & O. Instead, it held that P. & O. was not negligent. It follows therefore that the Court of Appeals did not err in declining to rule on the validity of the exculpatory clause.

V.

No Question of Continuing Importance in Admiralty Is Presented by the Instant Action.

Pettioners' final reason for the granting of their petition is that the case presents a question of continuing importance in admiralty law. The entire argument in this regard is predicated upon the importance of a determination of the effect of 46 U.S.C. Section 183(c) upon exculpatory clauses in boarding passes executed by social guests of crew members. Such issue was neither considered nor decided by the Court of Appeals in this action. There is even less reason for the Court to Grant certiorari to review this issue, in a case in which it is not presented by the determination of the Court of Appeals, then there was for the Court to determine the issue in *Kermarec* where certiorari had been granted because of the importance of another issue in the case; yet in *Kermarec* this Court specifically declined to decide that issue because it was not clearly presented.

Conclusion.

Thus, the decision of the Court of Appeals (1) does not violate standards set by this Court, (2) does not conflict with the decisions of other Courts of Appeal, (3) is not erroneous, and (4) presents no questions of importance in the administration of maritime law. Petitioners seek merely to have this Court review the facts of this particular case, by reason whereof the petition for certiorari should be denied.

Respectfully submitted,

FRANCIS L. TETREAULT,
Attorney for Respondent.